(2)

Supreme Court, U.S.
FILED
FEB 9 - 2005
OFFICE OF THE CLERK

No. 04-768

Supreme Court of the United States

MICHAEL CERVINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Brian C. Southwell
Attorney for Michael Cervini
MN ID #103706
701 - 4th Ave. South, Suite 500
Minneapolis, MN 55415
(Phone: 612-337-9573)

TABLE OF CONTENTS

Page:

Table of Contents i

Table of Authorities ii

Petitioner's Reply to United States Brief in Opposition 1

1.) **THE GOVERNMENT CORRECTLY ARGUES THAT THE COURT OF APPEALS "ACTUAL INNOCENCE" DETERMINATION CONFLICTS WITH CASES INVOLVING FIREARMS AND RACKETEERING AS WELL AS PORNOGRAPHY; THIS MILITATES FOR CERTIORARI, NOT AGAINST** 1

Conclusion 3

TABLE OF AUTHORITIES

Page:

Cases

United States v. Benboe,
157 F.3d 1181; 1998 U.S. App. LEXIS 24417
(9th Cir. 1998).....1
United States v. Boyd,
312 F.3d 213; 2002 U.S. App. LEXIS 24483
(6th Cir. 2002).....2
United States v. Montano,
381 F.3d 1265; 2004 U.S. App. LEXIS 18159
(11th Cir. 200).....2
United States v. Sanders,
157 F.3d 302; 1998 U.S. App. LEXIS 25452
(5th Cir. 1998).....1
United States v. Waucaush,
380 F.3d 251; 2004 U.S. App. LEXIS 18137
(6th Cir. 2004).....1
Vasquez v. United States,
454 U.S. 975, 70 L.Ed.2d 396,
102 S.Ct. 528 (1981).....2

PETITIONER'S REPLY TO UNITED STATES BRIEF IN OPPOSITION

1.) THE GOVERNMENT CORRECTLY ARGUES THAT THE COURT OF APPEALS "ACTUAL INNOCENCE" DETERMINATION CONFLICTS WITH CASES INVOLVING FIREARMS AND RACKETEERING AS WELL AS PORNOGRAPHY; THIS MILITATES FOR CERTIORARI, NOT AGAINST

In the government's brief in opposition, their attorney argues that the cases cited by Mr. Cervini as conflicting with the actual innocence determination in his case[1] involve

---

[1] *United States v. Sanders*, 157 F.3d 302; 1998 U.S. App. LEXIS 25452 (5th Cir. 1998) (fact that defendant "pleaded guilty to an indictment stating that he 'did knowingly...carry and use a firearm'" insufficient to preclude claim of actual innocence of carry and use of a firearm when meaning of word "use" subsequently changed by Supreme Court decision); *United States v. Waucaush*, 380 F.3d 251; 2004 U.S. App. LEXIS 18137 (6th Cir. 2004) (defendant "may be actually innocent" of activity affecting interstate commerce "even though he admitted as part of his plea that his activities "affected interstate commerce"); *United States v. Benboe*, 157 F.3d 1181; 1998 U.S. App. LEXIS 24417 (9th Cir. 1998) (statement in plea agreement "that he had a marijuana grow operation in his home and maintained a loaded firearm which he carried and/or used in relation to the marijuana grow and marijuana conspiracy" together with statement in plea colloquy "that he was involved in the distribution of marijuana and that he had 'possession of the firearm in the

firearms and racketeering as well as pornography. The government attorney argues that this fact militates against certiorari.

While it is true that the cases cited involve firearms and racketeering as well as pornography, this fact demonstrates how broadly Mr. Cervini's case can be applied in the courts below. This is a further and important consideration which strongly militates for grant of certiorari. *Vasquez v. United States*, 454 U.S. 975, 70 L.Ed.2d 396, 102 S.Ct. 528 (1981), not against certiorari as argued by the government attorney.

---

use of the drug transaction'" and evidence that gun was found in room where narcotics transaction took place, was insufficient to preclude actual innocence of "use" of firearm in Drug Trafficking Crime, where Supreme Court changed meaning of word "use" after plea); *United States v. Montano*, 381 F.3d 1265; 2004 U.S. App. LEXIS 18159 (11th Cir. 200) (plea of guilty to "use of a firearm during and in relation to ... drug trafficking crime" did not preclude actual innocence when Supreme Court changed meaning of word "use" after plea). *Cf. United States v. Boyd*, 312 F.3d 213; 2002 U.S. App. LEXIS 24483 (6th Cir. 2002) (acquiescence "that the material he tried to send was 'pornographic child pornography,'" was "no more than a conclusory description of the nature of the material in question, rather than evidence").

CONCLUSION

For all of the foregoing reasons, Petitioner Michael Cervini respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming the District Court dismissal of his motion pursuant to 28 U.S.C. § 2255 without reaching the merits and **REMAND** to the court of appeals for reconsideration in light of *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998).

Brian C. Southwell
Attorney for Michael Cervini
701 - 4th Ave. South, Suite 500
Minneapolis, MN 55415
(Phone: 612-337-9573)

Date: _____